and local authorities already had adopted regulations regarding human exposure to RF radiation. *Id.* (¶ 188).

In the absence of any federal standards, the FCC adopted radiation guidelines in 1985 that had been issued by the American National Standards Institute (ANSI), a private organization. Report and Order, 100 F. C. C. 2d 543 (¶¶ 8, 22). In so doing, the FCC reaffirmed its procedural duties under NEPA. *Id.* (¶¶ 1-3, 8, 22, 29-30). FCC acknowledged "that it lacked the authority to develop its own health and safety standards" (*id.*, ¶ 49), but decided that use of ANSI guidelines would best fulfill its statutory obligations under NEPA. *Id.* (¶¶ 23-24). Noncompliance with ANSI guidelines was to be the trigger for invoking the FCC's environmental procedures implementing NEPA. *Id.* (¶¶ 26-27, 53). The FCC's 1985 action, however, was limited in scope. As the Petition observes, "[m]any low power devices, including wireless telephones, were 'categorical[ly] exclu[ded]' from NEPA obligations . . ." Petition, at 9. That is an understatement. In fact, the FCC regulation implementing NEPA applied only to radio and television broadcast facilities, satellite earth stations and experimental facilities. Report and Order, *supra* (¶¶ 1, 54-57) and Appendix 1. *All other* types of FCC-licensed facilities and systems, including "cellular," were to be categorically excluded from FCC regulation of exposure to RF radiation. *Id.* (¶¶ 46, 58). *See* Second Report and Order, *Biological Effects of Radiofrequency Radiation*, 2 F.C. C. R. 2064 (¶¶ 15-16, 24) (1987) (ordering categorical exclusion).

In 1992, ANSI adopted new, more restrictive guidelines regarding permissible RF exposure. Notice of Proposed Rulemaking, *Guidelines for Evaluating the Environmental Effects of RF Radiation*, 8 F.C.C.R. 2849, 2850 (¶ 6) (1993). These changes included removal of categorical exclusions of certain low-power devices, including hand-held wireless telephones. *Id.*, 2850 (¶ 7). To meet its NEPA obligations (*id.*, 2854, ¶ 31.A.), the FCC proposed replacing the 1982 ANSI guidelines with the 1992 version. *Id.* (¶¶ 8-9). FCC rulemaking

would consider whether hand-held portable devices, like cellular telephones, must be evaluated according to the revised standards. *Id.*, 2852 (¶ 16).

While rulemaking went forward, Congress enacted the Telecommunications Act of 1996 (TCA). Section 704 of the TCA contained two provisions relating to FCC regulation of the environmental effects of RF radiation. The Petition focuses upon § 704(b) of the TCA, in which Congress directed the FCC within 180 days to complete its rulemaking and prescribe rules regarding the environmental effects of RF "emissions".[3] Petition, at 10. The Petition concludes from legislative history[4] that this call "for swift action" was "based upon Congress' judgment" that national uniformity and a balance between public health and the speedy deployment of wireless services were major objectives of the TCA. Petition, at 10, 20.

The other TCA provision, TCA § 704(a), was a major subject of discussion below and was considered in depth in the

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[3] The Petition's reference to "radio frequency *transmissions*" (at 10) is in error. The statutory text is accurately set forth in Pet. App. 135a.

[4] The Petition (at 10) quotes two passages from the Report of the House Commerce Committee, which wrote the initial draft of §704 of the TCA, but fails to note that both passages were limited in context to "siting and zoning decisions" of state and local governments. H. R. Rep. No. 204, 104th Cong., 1st Sess. (1995) at 94-95. The Petition also overlooks the fact that the Report was later superseded by the Report of the House Conference Committee, which rewrote the Commerce Committee bill. H. Conf. Rep. No. 458, S. Rep. No. 230, 104th Cong., 1st Sess. (1996). "The conference agreement created a new section 704 which *prevents* Commission preemption of local and state land use decisions and *preserves* the authority of state and local governments over zoning and land use matters except in the limits set forth in the conference agreement." *Id.*, 207-208 (emphasis added). *See City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1462-63 (Mar. 22, 2005) (Breyer, J., concurring) (in enacting the TCA "Congress ultimately rejected the national approach and substituted a system based on cooperative federalism").

opinions of both courts. *See* Pet. App. 35a-38a, 41a-44a, 59a-60a, 66a-67a, 88a-90a. Section § 704(a) defined the preemptive reach of the regulations that § 704(b) directed the FCC to prescribe. Section 704(a) added a new subsection, 47 U.S.C. § 332(c)(7), entitled "[p]reservation of local zoning authority," which included an express pre-emption clause:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions *to the extent that such facilities comply with the Commission's regulations concerning such emissions.*

47 U.S.C. § 332(c)(7)(B)(iv) (2000)(emphasis added). Prior to passage of the TCA, state and local governments were regulating the environmental effects of RF radiation. Without specific statutory authority to intervene in that area, the FCC declined to preempt such state and local regulations. *See* Notice of Proposed Rulemaking, *Procedures for Requests for Relief from State and Federal Regulations*, 12 F.C.C.R. 13,494, 13,542-43 (¶ 120) (1997). The FCC regarded § 332(c)(7)(B)(iv) as providing the needed preemptive authority. *Id.*, 13,543 (¶ 122).

On August 1, 1996, the FCC adopted new guidelines for evaluating the environmental effects of RF radiation emitted by all licensed activities. Report and Order, *Guidelines For Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15,123 (1996). For the first time, the FCC's RF radiation regulations covered "portable devices" such as wireless handheld telephones designed to be used against the head or within 20 centimeters of the body. *Id.*, 15,147 (¶ 63) and 15,217, adopting 47 C. F. R. § 2.1093. The regulation of portable devices was attributed to the FCC's "responsibilities under [NEPA] to evaluate the environmental significance of its actions." 47 C. F. R. § 2.1093(a). Portable devices became subject to routine evaluation for RF radiation prior to equipment authorization or use. 47 C.F.R § 2.1093(c). The exposure limits were quantified in terms of specific ab-

sorption rate (SAR). SAR limits applicable to "general population" exposure to "portable devices" is 1.6 watts/kg, averaged over one gram of tissue. 47 C.F.R § 2.1093(d)(2). *See* 1996 Report and Order, *supra*, 11 F.C.C.R. at 15,140-15,152 (¶¶ 46-74), 15,218-19. Before adopting its "portable device" regulation, the FCC received comments from federal health and safety agencies such as the Food and Drug Administration (FDA).[5] *Id.*, 15,125 (¶ 2). The FCC also adopted a regulation patterned on 47 U. S. C. § 332(c)(7)(B)(iv) and incorporated *verbatim* its preemptive language. 47 C.F.R. § 1.1307(e).

Ever since the TCA took effect and the FCC adopted its radiation guidelines, scientists have debated whether the public is adequately protected against non-thermal effects of long-term exposures to low levels of RF radiation from wireless phones. The FCC guidelines have been held to comply with NEPA procedures. *EMR Network v. FCC*, 391 F.3d 269 (D. C. Cir. 2004); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90-92 (2d Cir. 2000). Nevertheless, the scientific community remains concerned about the health effects of low-level but long-term exposures.

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[5] In its Report and Order, the FCC acknowledged the FDA's "general jurisdiction for protecting the public from potentially harmful radiation from consumer and industrial devices . . . such as cellular telephones." 11 F.C.C.R. at 15,130, ¶ 18. Under the delegated authority of the Electronic Product Control Act of 1968, 21 U. S. C. §§ 360hh-360ss FDA "shall by regulation prescribe performance standards for electronic products to control the emissions of electronic product radiation from such products if [FDA] determines that such standards are necessary for the protection of the public health and safety." 21 U. S. C. § 360kk(a)(1). If FDA performance standards have been prescribed by regulation and have taken effect., they preempt non-identical state and local standards. 21 U. S.C. § 360ss. FDA has not issued regulations prescribing a standard applicable to radiation-emitting wireless telephones. Meanwhile, in the absence of an applicable FDA regulation, States retain authority to establish or continue in effect performance standards of their own. *Ibid.*

The Petition notes that the FCC's website proclaims that any wireless phone that conforms to its SAR guidelines is a "safe" phone. Petition, at 20, n.4. Elsewhere, however, the FCC is much more guarded in its evaluation of safety. Handheld wireless phones "can expose the user to measurable radio-frequency energy (RF) because of the short distance between the phone and the user's head." *Cell Phone Facts: Consumer Information on Wireless Phones*, at http://www.fda.gov/cellphones/qa.html (joint FDA-FCC website, last updated July 29, 2003). Currently, no assurance can be given that these devices are "absolutely safe." *Ibid.* There remain many unresolved "questions about the possible effects of low levels of RF energy." *Ibid.* Scientific studies have produced conflicting and inconclusive results; "none of the studies can answer questions about long-term exposure" and "it is generally agreed that further research is needed to determine what effects actually occur and whether they are dangerous to people." *Ibid.*[5] In the meantime, consumers are advised that "[w]hen the phone is located at greater distances from the user, the exposure to RF is drastically lower because a person's RF exposure decreases rapidly with increasing distance from the source." *Ibid.*

> If you must conduct extended conversations by wireless phone every day, you could place more distance between your body and the source of RF, since the exposure level drops off dramatically with distance. For example, you could use a headset and carry the wireless phone away

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[5] The National Toxicology Program of the Department of Health and Human Services offers a more recent assessment: FCC "guidelines are based on protecting the user from acute injury from thermal effects produced by radio-frequency radiation. *Current data are insufficient to draw definitive conclusions concerning the adequacy of these guidelines for protecting against potential adverse effects of chronic exposure.*" *Radio-frequency Radiation Emissions from Cellular Phones*, http://ntp-server.niehs.nih.gov/files/cellphones.pdf, last updated March 7, 2005 (emphasis added).

from your body or use a wireless phone connected to a remote antenna. *Ibid.*

No FCC regulation forbids licensees from passing along such advice to consumers. By FCC definition, members of the "general population" are persons "who may not be fully aware of the potential for exposure or do not exercise control over their exposure" to RF radiation from portable devices. 47 C.F.R. § 2.1093(d)(2). Headsets enable consumers to control their exposure. No FCC regulation forbids licensees from providing consumers with headsets.

2. Proceedings Below. Contrary to the question presented in the Petition (at i), this case does *not* "seek to declare FCC-approved wireless telephones 'unreasonably dangerous' as a matter of state law." Rather, it assumes that consumers are entitled to know that they are being exposed to unwanted radiation and to be equipped with a practical means of avoiding any such exposure.

The case originated on May 27, 2000, with the filing of a class action petition for damages in the Civil District Court of Orleans Parish, Louisiana, by Garrett E. Naquin and others, individually and on behalf of a class of wireless telephone consumers. The class action petition alleged that Petitioners manufacture or distribute wireless telephones that direct RF radiation into the ear and brain, exposing users to risks of significant long term-health problems and injury. The petition alleged that Petitioners knew the health risks but failed to protect users by means of headsets permitting the phone to be used at a distance from the ear. It was alleged that headsets are economically feasible and currently available. The petition asserted claims of breach of warranty, redhibition, misrepresentation, and breach of contract under Louisiana law.

Petitioners removed the case to the United States District Court for the Eastern District of Louisiana *solely* on the basis of diversity of citizenship. Petitioners answered the class action petition and moved for judgment on the pleadings,

contending that the claims are preempted by the Electronic Product Radiation Control Act of 1968, 21 U. S. C. §§ 360hh-360ss. Petitioners argued that the Act vested in the FDA the "exclusive" authority to establish standards of safety with respect to products that emit RF radiation, such as portable telephones. The district court denied Petitioners' motions (*see* Pet. App. 63a) and declined to certify an interlocutory appeal pursuant to 28 U.S. C. § 1292(b).[6]

Respondents then filed their first supplemental and amending class action complaint. Pet. App. 186a-241a.[7] The complaint alleged that the action arose out of wireless telephones manufactured and distributed without headsets that protect users from RF radiation emitted from the antenna to the ear. Pet. App. 189a. It alleged that users are exposed to unwanted RF radiation creating health risks and such adverse effects as nerve damage, cellular damage and cellular dysfunction. *Ibid.* The complaint summarized numerous studies that have documented these risks and adverse effects. Pet. App. 190a-203a. It alleged that Petitioners were aware of the effects of long-term exposure to emissions, but failed to inform consumers that RF radiation absorbed in bodily tissue can result in undesired biological changes and health risks. Pet. App. 203a-204a. Petitioners were charged with deceiving consumers into believing that wireless telephones operate at power levels too low to cause any health risks and, in the absence of headsets, are completely safe for use, and in ignoring research studies demonstrating

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[6] Having litigated and lost on the issue of FDA preemption, Petitioners here downgrade the FDA's regulatory authority from "exclusive" to merely "overlapping." Petition, at 12.

[7] That complaint, as appended to the Petition, later was superseded by a second supplemental and amending class action complaint filed in the District of Maryland. C. A. App. 966-1021. The latter complaint is not appended to the Petition, although it served as the basis of the district court's dismissal of the action on preemption grounds and the Fourth Circuit's review of that dismissal.

that such unqualified assurances are unwarranted. Pet. App. 204a-206a, 210a-221a, 222a-229a. The complaint also alleged that Petitioners have suppressed research findings that undermine their assurances of safety (Pet. App. 206a-207a, 216a-217a, 228a-229a), while understating known or potential health risks that might discourage sales. Pet. App. 208a-209a. Despite scientific findings that the antenna is the most efficient means of depositing energy into the body and penetrating human tissue, especially the brain (Pet. App. 211a-212a, 214a-215a), the complaint alleged that Petitioners have failed to provide consumers with headsets that insulate consumers from undesired and unnecessary close-range exposure to RF radiation. Pet. App. 233a-234a. Contrary to the Petition (at 13), the complaint did *not* assert product liability claims. Rather, it explicitly deleted all such claims. Pet. App. 240a. The complaint reasserted claims under the Louisiana law of redhibition, breach of warranty, breach of contract and misrepresentation. Pet. App. 236a-237a. In addition, the complaint added federal claims under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* Pet. App. 237a-238a.

Petitioners moved to dismiss the state-law claims as insufficient as a matter of Louisiana law. Those motions were briefed and argued, and were awaiting decision on October 31, 2001, when the Judicial Panel on Multidistrict Litigation ordered transfer of the Louisiana case to the United States District Court for the District of Maryland for consolidation with four similar actions. *In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 170 F. Supp.2d 1356 (J.P.M.L. 2001). The other actions had been brought in Georgia, Maryland, New York and Pennsylvania state courts on various theories of negligence, strict product liability, breach of implied warranty, fraud, civil conspiracy and consumer protection law violations. The complaints in those four actions pleaded only state-law claims. Nevertheless, they were removed on federal question grounds. On June 21, 2002, the district court denied motions to remand those cases. Pet.

App. 129a. Respondents were not involved in the removal-remand proceedings.

Petitioners moved pursuant to Rule 12(b)(6), F. R. Civ. P., to dismiss all five actions (including the Louisiana case) on grounds that each was preempted by federal law. First, they contended that a state-imposed headset requirement was expressly preempted as "entry" regulation within the meaning of 47 U.S.C. § 332(c)(3)(A). Second, Petitioners argued that the claims also were expressly preempted by the TCA provision that precludes state or local regulation of the placement, construction and modification of personal wireless facilities on the basis of the environmental effects of RF radiation. 47 U.S.C. § 332(c)(7)(B)(iv). Third, Petitioners asserted that Congress had occupied the field of RF emissions from wireless phones, leaving no room for state regulation. Finally, Petitioners alleged that the claims are preempted because they conflict with federal objectives of national uniformity in regulation and the need to balance rapid deployment of a seamless, nationwide wireless network with adequate protection of the public.

Respondents opposed the motion to dismiss. They also filed their second supplemental and amending class action complaint on September 19, 2002. C.A. App. 966-1026. This complaint superseded their first complaint (Pet. App. 186a-241a), adding new paragraphs and deleting others. In particular, Respondents added new claims for fraud by concealment, civil conspiracy to defraud, and unjust enrichment. C.A. App. 1007-14. Claims previously alleged, including state-law claims of redhibition and federal claims under the Magnuson-Moss Warranty Act, were reasserted. For each Respondent and class member the complaint requested (1) a headset or funds to purchase a headset compatible with the individual's phone; or (2) reimbursement for the cost incurred previously to acquire a headset, or (3) a replacement phone

that can be used with a headset. Contrary to the Petition (at 13), no injunction was requested.

On March 5, 2003, without deciding other theories of preemption, the district court dismissed all five actions on the basis of conflict preemption. Pet. App. 74a, 76a. Specifically, the court concluded that "plaintiffs' state tort lawsuits stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' [citation omitted], namely, deference to the expertise of federal agencies, the development of national uniform standards, and the balance between developing a wireless telecommunications system and protecting the public." Pet. App. 72a. *See also* 64a-65a, 73a. The court attributed those purposes and objectives to the TCA's legislative history and enactment. Pet. App. 66a-67a.

A panel of the Fourth Circuit reversed. Pet. App. 4a-45a. The panel (Luttig and Michael, Circuit Judges, and Kiser, Senior District Judge) was divided on the question of removal jurisdiction, Judge Kiser dissenting. Pet. App. 50a. In regard to the Louisiana case, which raised no jurisdictional issue, the panel reversed the order dismissing that case on preemption grounds. The panel reviewed the statutory provisions invoked by Petitioners, 47 U.S.C. §§ 332(c)(3)(A) and 332(c)(7)(B)(iv), and concluded that the state-law claims were not expressly preempted by either provision. Pet. App. 35a-40a. The panel also disagreed with the district court's finding of conflict preemption. Pet. App. 41a-45a. It noted that "[t]he district court relied on § 332 of the FCA to find a sweeping congressional objective" of subjecting all wireless communications to national RF standards. Pet. App. 41a-42a. The panel found no evidence from which to imply a congressional goal of achieving preemptive national RF radiation standards for wireless telephones. Pet. App. 42a-43a. It also concluded that a headset remedy would not stand as an obstacle to the federal goal of achieving national coverage of wireless communications. Pet. App. 45a. The panel also ruled out field preemption. *Ibid.* The order dismissing the Louisiana claims was

reversed and the case remanded to the district court for further proceedings. Pet. App. 45a. Petitioners requested rehearing and rehearing en banc but their petition was denied. Pet. App. 133a. No member of the Court or the panel requested a poll. *Ibid.*[8] There was no dissent.

REASONS FOR DENYING THE WRIT

I. The Issue Of Conflict Preemption Was Correctly Decided And Does Not Require Plenary Review By This Court.

1. This case poses finality problems that the Petition overlooks. First, the judgment under challenge has not yet become final. Although this Court has jurisdiction to review interlocutory decisions of federal courts, it rarely does so and should not do so here. *See* Stern and Gressman, *Supreme Court Practice* § 418 (8th ed. 2002). The decision below leaves the trier-of-fact free to decide in favor of the Petitioners on any permissible ground other than preemption. If Petitioners prevail, further review of the questions presented would be unnecessary. If Respondents prevail, a definitive resolution of those questions would benefit from a final judgment and a concrete factual record. In either event, stepping in now can only delay the resolution of a five-year old case in which the issues still depend upon mere allegations and inferences drawn from pleadings.

Second, in addition to state-law claims, this action includes claims pending under the Moss-Magnuson Warranty Act, 15 U.S.C. §§ 2301, *et seq.* Pet. App. 237a-238a. The Fourth Circuit did not pass on the merits of the federal claims, but

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[8] Petitioners proffer a form dated April 11, 2005, authorizing amicus participation by the FCC in support of their rehearing petition. Pet. App. 184a. Petitioners speculate that this form expresses "the FCC's view that the panel decision was wrong and should be reviewed by the full court." Petition, at 16. In fact, the FCC never contacted the court of appeals nor attempted to file an amicus brief. *See* Rule 29, F. R. A. P.

remanded them to the district court for further proceedings. Those claims will remain unresolved even if this Court were to review the questions presented by the Petition involving preemption of the state-law claims.

2. The Petition raises two questions. The first asks whether federal law preempts claims that "seek to declare FCC-approved wireless telephones 'unreasonably dangerous' as a matter of state law." Petition, at i. The second question is whether a federal statute "precludes state law from imposing new RF *standards* or operational *requirements*" on wireless telephones." *Ibid* (emphasis added). Both questions are premised upon the misconception that this action "alleged that FCC-approved wireless telephones are defective products and unreasonably dangerous under the product liability and tort laws" of Louisiana. Petition, at 12-13, 20, 21. The Petition assumes that the action will establish various state-law "standards", "requirements" or "mandates". Petition, at 3, 4, 17, 21, 23, 24. In fact, the action exhibits none of these characteristics. It asserts no product liability claim in which proof of an "unreasonably dangerous" product would be a necessary element. It does not seek to impose any standard, requirement or mandate under state law in conflict with federal law. In short, this action is beyond the scope of the questions presented.

Petitioners did not attempt below to examine the Louisiana causes of action. As a result, the lower courts have not defined the specific claims asserted. Review of this case might oblige this Court either to explore Louisiana civil law concepts or else remand the case for that purpose. Because conflict preemption "turns on the identification of 'actual conflict'" between a state legal requirement and federal law, Petition, at 19, quoting *Geier v. American Honda Motor Co.*, 529 U. S. 861, 884 (2000), it is necessary to identify a requirement—a rule of law that must be obeyed. *Bates v. Dow Agrosciences LLC*, 125 U. S. 1788, 1799 (Apr. 27, 2005).

In this case the express warranty and contract claims are based not upon state-imposed requirements but, rather, upon volitional activities of Petitioners. Rules of Louisiana law enforcing their voluntary undertakings plainly do not qualify as requirements. *Bates*, 125 S. Ct. at 1798. *See Cipollone v. Liggett Group, Inc.*, 505 U. S. 504, 526 (1992) (plurality opinion). Although claims of fraudulent concealment and civil conspiracy may impose requirements, they do not conflict with federal law. Those claims are predicated on state-law duties not to conceal material facts and not to conspire to commit fraud. *Id.* at 528, 530. FCC regulations neither require nor permit Petitioners to engage in such misconduct.

That leaves Respondents' claim of redhibition—a cause of action unique to Louisiana. The claim is defined by LA. CIV. CODE ANN. Art. 2520 (West 2003). See Pet. App. 56a, n. 7. There is a subset of rules, including the seller's option to repair or replace the thing sold. *Id.* arts. 2522, 2531. Redhibition is analogous to a claim for full or partial rescission of a sale and recovery is limited to economic loss only. *See, e.g., Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250-51 (5th Cir. 2002). The Code treats a redhibition suit as a contractual action and the remedy is related to the contract of sale. *Touro Infirmary v. Sizeler Architects*, 900 So.2d 200, 205-06 (La. App. 2005). As a contractual remedy for a voluntary undertaking between parties to a sale, redhibition does not impose a state law requirement. *Bates*, 125 S. Ct. at 1798.

There is no inevitable conflict between pre-existing Louisiana consumer remedies and the FCC's later decision to regulate the RF radiation of wireless phones. Traditional exercise of a State's police powers ordinarily co-exists with federal regulation, in the absence of a clear and direct conflict. Although the FCC was obliged to consider the effect of its actions on the environment, that is all that NEPA requires. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983). NEPA does not dis-

place state remedies for the protection of consumers against harms only remotely connected to changes in the environment. FCC regulates "portable devices intended for use by consumers," 47 C.F.R. § 2.1093(d)(5), but such intended use—in close proximity to the human ear—has less impact upon the environment than upon the consumer, whose use is unregulated. Even among federal agencies, the FCC lacks primary jurisdiction over product safety and consumer protection matters historically belonging to the States.

Petitioners unleash a parade of horribles that would materialize if state law entitles consumers to headsets and instructions for use. According to the Petition, the decision below will allow state courts to impose "design, labeling and equipment mandates for wireless telephones" (at 3) and "will threaten the ability of the wireless network to serve critical national security and public safety functions" (at 17). These doomsday predictions, however, are not supportable by the claims actually asserted or the relief sought. Of course, if successful, those claims might induce Petitioners to honor their voluntary undertakings and tell the truth.

As the Fourth Circuit concluded, "[i]t is difficult to understand how a headset requirement (the specific relief sought) would affect the establishment of a nationwide wireless network or the availability of wireless service coverage." Pet. App. 44a-45a. The FCC contemplates headset use by consumers who are concerned about RF exposure. *See* discussion, *supra*, pp. 7-8. Judging by their websites, Petitioners market a variety of headsets for use in conjunction with the handheld phones they make or distribute. Headsets are offered as optional accessories and, occasionally, have been given away as promotional items in conjunction with service plans.

The fact that a portable wireless telephone is a regulated product does not affect its status as a consumer product. Once a product enters the stream of commerce it is placed in the hands of consumers beyond practical control of the FCC or its

licensees. At that point the State's police power is paramount. If the product is not what was warranted, promised or represented, federal regulation is not a compelling reason either for depriving a consumer of state remedies or for conferring automatic immunity upon the warrantor, the promisor or the dissembler.

3. The Petition's lead argument centers on the law of agency conflict preemption. Petition, at 17, 18-19. Under that doctrine a federal agency, acting within the scope of its congressionally delegated authority, may preempt state regulation. *Fidelity Fed. Savs. & Loan v. de la Cuesta*, 458 U.S. 141, 152-54 (1982). In such a case a "narrow focus on Congress' intent to supersede state law [is] misdirected." *Id.* at 154. Agency conflict preemption thus differs from ordinary conflict preemption that arises when state regulation is so inconsistent with federal regulation that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Louisiana Pub. Svc. Comm'n. v. FCC*, 476 U.S. 355, 369 (1986). These contrasting varieties of conflict preemption "raise two quite different questions." *New York v. FERC*, 535 U. S. 1, 17 (2002).

The Petition complains that the decision below is "myopic" because it failed to identify and thus "disregarded" the "bedrock principles" of agency conflict preemption. Petition, at 18. The short answer to that contention, however, is that Petitioners never argued agency conflict preemption in support of their Rule 12(b)(6) motion to dismiss nor discussed it in the proceedings below. For that reason, and that reason alone, the question was not passed upon by the district court or the court of appeals. It is not properly before this Court.

Petitioners direct their criticism to the Fourth Circuit alone: "Had the panel majority asked the right question," the Petition confides, the answer would have been "yes", as the district court concluded. Petition, at 19. The Petition does not pause to identify the "right question", as actually posed by the

district court: "The question, then, is whether permitting these lawsuits would 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pet. App. 64a. That is exactly the question addressed, each in turn, by the district court (Pet. App. 65a-74a) and the Fourth Circuit (Pet. App. 41a-45a). In answering that question, both courts examined diligently the purposes and objectives of Congress, apparently oblivious to the other question that Petitioners never briefed nor argued but that they *now* say is central to their case.

The failure of the opinions below to discuss agency conflict preemption speaks volumes as to the extent that the doctrine was presented to the lower courts. It is uncharitable, if not disingenuous, for the Petition (at 18) to blame the Fourth Circuit for having "disregarded" a question that was never presented to either court with reasonable clarity. The reality is that the Fourth Circuit was denied fair opportunity to pass upon the question now surfacing for the first time in this Court. Its belated assertion here does not merit review. *See, e.g., Sprietsma v. Mercury Marine*, 537 U. S. 51, 56, n.4 (2002) (contention that maritime law governs preemption analysis not considered because it was not raised below).

4. Even if the question of agency conflict preemption was properly before the Court, that question ultimately must be resolved against Petitioners. Under that doctrine, "a federal agency may pre-empt state law only when and if it is acting within the scope of a congressionally delegated authority." *Louisiana Pub. Svc. Comm'n.*, 476 U. S. 355, 374 (1986). The Petition (at 18) declares that Congress "indisputably" has authorized the FCC to regulate the level of RF radiation emitted by wireless phones. The Petition, however, fails to identify the exact source of that authority or the particular FCC regulation meant to displace state health and safety laws. Nowhere does the Petition even mention § 704(a) of the Telecommunications Act of 1996 (TCA) or 47 U. S. C.

§ 332(c)(7)(B)(iv), enacted as part of § 704(a). Those provisions, and TCA § 601(c)(1), refute the Petitioners' argument.

Clearly, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of its authority granted by Congress to the agency." *Louisiana Pub. Svc. Comm'n.*, 476 U. S. at 374. *See New York v. FERC*, 535 U. S. 1, 18 (2002). The FCC has pinpointed the source of its authority to regulate the subject of wireless phone radiation: "FCC derives its authority to regulate wireless telephones from the National Environmental Policy Act of 1969 (NEPA) and the Telecommunications Act of 1996." *Cell Phone Facts: Consumer Information on Wireless Phones*, available at http: www.fda.gov/cellphones/ (joint FDA-FCC website last updated June 30, 2005).

Petitioners have never contended that NEPA was intended to give the FCC any authority to displace conflicting state and local health and safety regulations. NEPA does not confer special authority upon the FCC, but imposes obligations on *all* federal agencies to consider the environmental impact of their proposed actions. 42 U.S.C. § 4332(2). NEPA imposes only procedural obligations. *Department of Transp. v. Public Citizen*, 541 U. S. 752, 756 (2004). "NEPA does not mandate particular results, but simply prescribes the necessary processes." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). "Because NEPA imposes no substantive requirement that mitigating measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." *Id.*, at 353, n. 16.

There is no indication that Congress intended agency environmental regulations implementing NEPA to have the effect of superseding state health and safety standards. Congress declared that "cooperation with State and local governments" was part of the continuing policy of the federal government.

42 U.S.C. § 4331(a). Nor has the FCC construed NEPA as statutory authority for preempting state and local regulation of the environmental effects of RF radiation. Even before it began regulating the subject, FCC recognized that state and local authorities already were regulating human exposure to RF radiation. Notice of Proposed Rulemaking, *Biological Effects of Radiofrequency Radiation*, 89 F. C. C. 2d 214, ¶ 188 (1982). In 1985, when the FCC began regulating the environmental effects of RF radiation, its regulations did not apply to wireless telephone systems, facilities or portable devices; all were categorically excluded. *See* discussion, *supra*, p. 3. The FCC then disclaimed "the authority to develop its own health and safety standards" (*ibid*), much less the authority to impose any standards on other federal agencies or state governments. State and local regulation in this area remained in effect well past the advent of the TCA.

Section 704 of the TCA marked the first occasion that Congress expressly addressed FCC regulation of the environmental effects of RF radiation. In § 704(b), Congress directed the FCC within 180 days to prescribe rules regarding the environmental effects of RF emissions. In addition, although the Petition does not refer to it, § 704(a) of the TCA gave express preemptive effect to the FCC regulations that § 704(b) directed the FCC to prescribe, but only to the extent stated in 47 U.S.C. § 332(c)(7)(B)(iv):

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions *to the extent that such facilities comply with the Commission's regulations concerning such emissions.*

47 U.S.C. § 332(c)(7)(B)(iv) (2000) (emphasis added).

The FCC has recognized the TCA as delegating new regulatory authority that it lacked previously. Before the TCA was enacted, the FCC did not construe NEPA as authorizing pre-

emption. NEPA took effect in 1969 and remained in effect while state and local authorities were adopting ordinances that restricted the siting of wireless facilities based upon concerns about RF radiation. Notice of Proposed Rulemaking, *Procedures for Requests for Relief from State and Federal Regulations*, 12 F.C.C.R. 13,494, 13,542-43, ¶ 120 (1997). At that time the FCC believed that it lacked the statutory authority needed to preempt such pre-1996 ordinances:

> Prior to passage of the Telecommunications Act [of 1996], there was no specific statutory authority providing that the Commission had jurisdiction over issues concerning environmental effects of RF emissions. Issues concerning RF emissions were reviewed by the Commission on a case-by-case basis. Without the specific statutory authority, the Commission declined to preempt such state and local regulations.

Id. With passage of the TCA, the FCC found the specific authority it needed to preempt state and local regulations. *Id.* at 13,543, ¶ 122. Without passage, there would have been no rational basis for the FCC to alter its longstanding pattern of declining requests for preemption. The FCC reacted to passage by amending its NEPA regulation to incorporate the exact language of 47 U.S.C. § 332(c)(7)(B)(iv). *See* 47 C.F.R. § 1.1307(e) (not cited in the Petition and omitted from Pet. App.).

In the district court and again on appeal, Petitioners argued that the state-law claims were expressly preempted by § 332(c)(7)(B)(iv) and, moreover, were impliedly preempted because they would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Although the Petition presents no question involving § 332(c)(7)(B)(iv) or its interpretation, Petitioners continue to rely upon its legislative history as expressing the purposes and objectives of Congress that are being advanced by FCC regulation and that will be frustrated if the claims are

allowed to proceed. *See* Petition, at 10-11, 21. In short, the TCA fuels their conflict preemption argument.

The Fourth Circuit determined that § 332(c)(7)(B)(iv), viewed in context, applies to infrastructure-related "facilities", not to portable devices like wireless phones. Pet. App. 35a-38a. The Petition does not challenge this determination or the court's rejection of the express preemption defense. Instead, it contends that the court erred "by holding that the absence of express preemption creates a presumption against conflict preemption." Petition, at 22. What the court actually held was that "Congress has been very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation." Pet.App. 43a. The very specificity of § 332(c)(7)(B)(iv) "weighs against a finding that Congress has an implicit goal of making preemptive the RF radiation standards for all other types of wireless telecommunications equipment, including wireless telephones." Pet. App. 43a-44a.

Section § 332(c)(7)(B)(iv) marks the extent to which Congress intended FCC regulation of RF radiation to be given preemptive effect. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (the statute "contains the best evidence of Congress' intent"). By defining its own preemptive reach, that statute "implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). *See Freightliner Corp. v. Myrick*, 514 U. S. 280, 288 (1995). As *Freightliner* teaches, however, "the presence of an express preemption clause does not by itself entirely foreclose the possibility of implied conflict preemption." *Id.* at 288-89. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000).

Geier holds that the inclusion of an express preemption clause "does not bar the ordinary working of conflict preemption." *Id.*, 529 U. S. at 869; *see Sprietsma*, 537 U.S. at 65. Indeed, in enacting the TCA, Congress must have assumed

that its enactment would have implied effect and would prevail over conflicting state law, in the absence of a clear statement to the contrary. There can be no doubt, however, that Congress has the power to alter the traditional implied preemption analysis and allow state and local laws to operate in place of conflicting federal statutes and regulations. *Geier*, 529 U. S. at 872. Congress exercised that power in the TCA when it included a specific provision (overlooked by the Petition) precluding implied preemption of state and local law:

> *No Implied Effect*—This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

TCA § 601(c)(1) (note following 47 U.S.C. § 152). The plain meaning of this statutory language requires no interpretation. Any doubt as to the manifest intent of Congress is removed by consulting the legislative history of § 601(c)(1):

> The conference agreement adopts the House provision stating that the bill does not have any effect on any other Federal, *State* or *local* law unless the bill *expressly* so provides. *This provision prevents affected parties from asserting that the bill impliedly preempts other laws.*

H. Conf. Rep. No. 104-458, S. Rep. No. 104-230, 104th Cong., 1st Sess. (1996) at 201 (emphasis added). Thus, § 605(c)(1) of the TCA "specifically provides that the amendments shall not impliedly preempt state or local law." *City of Dallas v. FCC*, 165 F.3d 341, 346 (5th Cir. 1999). *See AT&T Communications of the Pacific Northwest, Inc., v. City of Eugene*, 35 P.3d 1029, 1046 (Or. App. 2001) (the TCA "itself declares that it is not to be interpreted to have implicit preemptive effect").[9]

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[9] Last Term, in construing § 601(c)(1) in another context, this Court indicated that claims that were available under other laws prior to the TCA "continue to be available after its enactment." *City of Rancho Palos Verdes*

5. In examining the issue of conflict preemption, the court of appeals looked to "the presumption against pre-emption of state police power regulations." *Cipollone*, 505 U.S. at 518. See Pet. App. at 34a. As the court of appeals observed, "there is a strong presumption against preemption when the federal government regulates in an area traditionally left to the states, such as health and safety." Pet. App. 41a, quoting *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996).

The Petition denies that any such presumption can diminish "conflicts with the federal regulatory regime." Petition, at 22. It invites comparison with cases which did not involve any issue of preemption, *e.g., Chevron U.S.A. Inc. v. NRDC*, 467 U. S. 837 (1984) (presumption not mentioned); *New York v. FERC*, 535 U.S. 1, 18 (2002) ("the question presented does not concern the validity of a conflicting state law or regulation"). The Petition also invokes decisions to the effect that the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) ("Congress has legislated in the field of maritime commerce from the earliest days of the Republic"); cf., *Buckman v. Plaintiff's Legal Comm.*, 531 U. S. 341 (2001).

The Petition's argument is unworthy of certiorari review and was properly rejected. State and local health and safety regulation has been applied to consumer products for decades. Recognizing that most wireless portable devices are "intended for use by consumers, such as hand-held cellular telephones," 47 C. F. R. § 2.1093(d)(5), the FCC did not begin regulating such devices for RF radiation until 1996, having categorically excluded them previously. In 1996, just before the FCC adopted its new regulation, one court found that "Congress has not empowered the FCC to regulate cellular

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v. Abrams, 125 S.Ct. 1453, 1461-62 (Mar. 22, 2005). Under § 601(c)(1), "other laws" include state and local laws.

telephones with regard to health effects and public safety" and that "FCC regulations cannot preempt a state's power on the issue in the instant case, *i.e.*, whether cellular telephones are unsafe and pose an increased health risk to plaintiffs." *Verb v. Motorola, Inc.*, 284 Ill. App.3d 460, 468, 672 N. E.2d 1287, 1293 (1996). Under these circumstances, the Fourth Circuit was justified in assuming as it did that the new FCC regulation was not meant to dislodge the historical police powers of Louisiana in regulating the health and safety aspects of consumer products. *See, e.g., Bates v. Dow Agrosciences*, 125 S. C. 1788, 1801 (Apr. 27, 2005); *Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525, 541-41 (2001) (consumer advertising). *See also* 47 U. S. C. §414.

II. The Fourth Circuit Was Correct In Holding That 47 U.S.C. § 332(C)(3)(A) Does Not Expressly Preempt The State Law Claims At Issue; Its Decision Is Not In Conflict With The Seventh Circuit.

Petitioners challenge the Fourth Circuit's holding that the Louisiana claims do not constitute "entry regulation" within the express preemption clause of 47 U. S. C. § 332(c)(3)(A). Pet. App. 38a-40a. According to the Petition, "the Fourth Circuit badly misread" this provision (at 4), "ignored the plain language and purpose of the statute" (at 25), "ignored congressional intent" (at 28), and "was also plainly wrong" (at 28). All of this criticism hinges entirely upon a truncated extract of the statute, which is all the Petition is willing to reveal. *See* Petition, at 4, 25, 26-27. The Petition fails to quote in full the pertinent text of § 332(c)(3)(A) and *never* mentions the "terms and conditions" clause:

> . . . [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, *except that this paragraph shall not prohibit a*

> *State from regulating the other terms and conditions of commercial mobile services . . . .*

47 U. S. C. § 332(c)(3)(A) (emphasis added).

The Petition asserts that this provision forbids state exercise of "any" authority to regulate entry. Petition, at 25, 26. Literally, that reading is correct. Whether the statute imposes a "flat ban on any form of entry regulation", however, as the Petition contends (at 25), necessarily depends upon the undefined scope of the term, "entry", viewed in the context of the statute as a whole. Although states cannot regulate entry, they "remain free to regulate 'other terms and conditions' of mobile telephone service." *Bastien v. AT&T Wireless Svcs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000). *See also Cellular Telecomm. Ind. Ass'n. v. FCC*, 168 F.3d 1332, 1335 (D. C. Cir. 1999); *Dakota Systems, Inc. v. Viken*, 2005 SD 27, 694 N. W. 2d, 23, 34 (2005). The legislative history strongly indicates that the statutory phrase, "other terms and conditions", is to be construed broadly:

> . . . By "terms and conditions", the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters*; . . . the bundling of services and equipment and the requirement that carriers make capacity available on a wholesale basis *or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under terms and conditions.*

H. R. Rep. No. 103-111 (1993), at 261 (emphasis added).

When § 332(c)(3)(A) is read in proper context, it is apparent that States may regulate and impose a variety of terms and conditions on services that arguably may have an indirect impact upon entry. Because the Petition fails to discern this "entry"—"conditions of services" dichotomy, the question presented to this Court is an empty enigma: "Whether the

categorical statutory ban on state 'entry' regulation in 47 U.S.C. § 332(c)(3)(A) precludes state law from imposing new RF standards or operational requirements on wireless telephones *as a condition for providing wireless service* within the State." Petition, at i (emphasis added). That question answers itself, because it is clear that the ban on "entry" does *not* preclude state law from imposing conditions for providing wireless services within the State.

The Fourth Circuit concluded that litigation of the Louisiana headset claims would not constitute a "barrier" to entry. Pet. App. 40a. Petitioners complain that the court "improperly engrafted an undefined 'barrier to entry' test on the provision's flat ban on any form of entry regulation" (Petition, at 25), contrary to the plain language of § 332(c)(3)(A). Petition, at 26-27. Any error in that regard, however, was induced by Petitioners. Their appellate brief advised the Fourth Circuit that § 332(c)(3)(A) was enacted in response to concerns that "state regulation was erecting entry *barriers* precluding the rapid development of a national wireless telephone network." C.A. Br. for Appellees, at 52 (emphasis added). The Fourth Circuit understood Petitioners to be arguing that state regulation of wireless telephone specifications would constitute a "barrier" to entry. Pet. App. 38a-39a. In any event, the "barrier" to entry point is purely one of semantics because § 332(c)(3)(A) contemplates that states remain free to impose conditions of service that may impact entry. "Congress did not intend the prohibition of market entry regulation to encompass all barriers or conditions to entry." *Dakota Systems, Inc.*, 694 N.W.2d at 38.[10]

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[10] The Petition asserts that "the panel majority began its examination of § 332(c)(3)(A) applying a presumption against preemption, which tainted the panel majority's entire analysis." Petition, at 25. That simply is not the case, although consideration of the presumption would have been proper. *See* discussion, *supra*, at pp. 24-25. The Fourth Circuit resolved the express preemption issue (Pet. App. 38a-40a) without resort to the

The Petition contends (at 4, 29-30) that the decision below conflicts with the Seventh Circuit's decision in *Bastien*. The *Bastien* decision rested upon a specific finding that "Bastien's complaint directly attacks AT&T Wireless's rates and its right to enter the Chicago market". 205 F.3d at 989. The complaint was construed as directly challenging "the modes and conditions under which AT&T Wireless may *begin* offering service in the Chicago market." *Ibid (emphasis added)*. The Fourth Circuit distinguished *Bastien* on that account. Pet. App. 39a-40a. Moreover, *Bastien* was decided under a standard of review not applicable here. The district court had denied Bastien's motion to remand his case and then granted a Rule 12(b)(6) motion to dismiss his complaint as preempted. On appeal, Bastien appealed the former ruling but not the latter. The actual holding in *Bastien* was that any error in dismissing the complaint had been waived. 205 F.3d at 986. Because denial of remand was the only issue presented for review, the Seventh Circuit declared that it was not bound to accept the truth of the allegations in Bastien's complaint. *Id.*, at 990. In contrast, the Fourth Circuit was reviewing the grant of a Rule 12(b)(6) motion to dismiss and was obliged to assume the truth of the allegations. Those allegations would allow proof that Petitioners are active participants in the market and are providing wireless services. It is not "entry" regulation to subject their post-entry activities to the lawful exercise of police powers and to judicial scrutiny under general law providing remedies for wireless phone consumers.

Because it dealt with a complaint "directly" attacking rates and market entry, *Bastien* stands in a category of its own. The Seventh Circuit recently limited the sweep of *Bastien* in *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1072-73 (7th Cir. 2004). The Petition also ignores a series of FCC declaratory

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presumption, which was discussed elsewhere in its opinion (Pet. App. 34, 41).

rulings recognizing that the indirect effects of state regulatory requirements do not constitute entry regulation:

> Clearly the Texas [universal service contribution] statute is not a direct regulation of entry. Although the contribution requirements arguably indirectly regulate entry by making it more difficult for some carriers to offer service, this is true of many of the requirements that Congress intended to include within "other terms and conditions" of service. Under the circumstances of this case, we do not conclude that these indirect effects render the Texas statute "regulation of entry" within the meaning of Section 332(c)(3).

Petition of Pittencrief Communications, Inc., 13 F.C.C.R. 1735, 1746 (¶ 22) (1997).

The FCC also has ruled that § 332(c)(3)(A) does not generally preempt the award of monetary damages by state courts based on state consumer protection, fraud or contract claims against service providers. *In the Matter of Wireless Consumers Alliance*, 15 F.C.C.R. 17,021, 17,022(¶ 2), 17,026(¶ 9), 17,028(¶ 14), 17,023 (¶ 24) and 17,040 (¶ 37) (2000). Whether a specific award is preempted will depend on the details of the award and the facts and circumstances of a particular case, to be determined in the first instance by a state trial court. *Id.* at 17,022 (¶ 2), 17,037 (¶ 28), 17,040 (¶ 36) and 17,041 (¶ 39). In drawing these conclusions, the FCC observed "that there is no necessary correspondence between the indirect effect that monetary liability may have on a company's behavior and a direct effect that a statute or regulatory rate requirement will have on that behavior." *Id.* at 17,034 (¶ 23). The FCC concluded that a monetary award "would generally fall under the terms and conditions provisions of Section 332, which can be the subject of state action." *Id.*, at 17039 (¶ 36).

The FCC rulings interpreting § 332(c)(3)(A) have enabled courts to allow a wide variety of claims that arise out of mobile wireless services. *See*, e.g., *Fedor*, 355 F.3d at 1074 (class

action for breach of contract); *Union Ink Co., Inc. v. AT&T Corp.*, 352 N. J. Super. 617, 801 A.2d 361 (2002) (class action alleging consumer fraud, common law fraud, and negligent misrepresentation); *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366, 104 Cal. Rptr. 2d 197 (2001) (class action alleging unfair business practices, false advertising, consumer protection violations, misrepresentation, breach of contract, restitution and injunctive relief). Such decisions fit this Court's analyses of express preemption. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) (distinguishing "direct state regulation" from "the incidental regulatory effects" of monetary awards). The interpretation of § 332(c)(3)(A) is not seriously in doubt. The decision below applied the statute correctly and does not give rise to any question substantial enough to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENTS' APPENDIX

STATUTES AND OTHER PROVISIONS INVOLVED

UNITED STATES PUBLIC LAWS
104th Congress—Second Session

PL 104-104 (S.652)
February 8, 1996

TELECOMMUNICATIONS ACT OF 1996

An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[...]

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

[...]

(c) FEDERAL, STATE, AND LOCAL LAW—

(1) NO IMPLIED EFFECT—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

[...]

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY—Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

'(7) PRESERVATION OF LOCAL ZONING AUTHORITY—

'(A) GENERAL AUTHORITY—Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

'(B) LIMITATIONS—

'(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

'(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

'(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

'(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

'(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless ser-

vice facilities shall be in writing and supported by substantial evidence contained in a written record.

'(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

'(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

'(C) DEFINITIONS—For purposes of this paragraph—

'(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

'(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

'(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require

individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).'.

(b) RADIO FREQUENCY EMISSIONS—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY—Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

[...]

UNITED STATES CODE (2000)

TITLE 21—FOOD AND DRUGS

CHAPTER 9—FEDERAL FOOD, DRUG, AND COSMETIC ACT

SUBCHAPTER VDRUGS AND DEVICES

Part C Electronic Product Radiation Control

[...]

Sec. 360kk. Performance standards for electronic products

(a) Promulgation of regulations

(1) The Secretary shall by regulation prescribe performance standards for electronic products to control the emission of electronic product radiation from such products if he determines that such standards are necessary for the protection of the public health and safety. Such standards may include provisions for the testing of such products and the measurement of their electronic product radiation emissions, may require the attachment of warning signs and labels, and may require the provision of instructions for the installation, operation, and use of such products. Such standards may be prescribed from time to time whenever such determinations are made, but the first of such standards shall be prescribed prior to January 1, 1970. In the development of such standards, the Secretary shall consult with Federal and State departments and agencies having related responsibilities or interests and with appropriate professional organizations and interested persons, including representatives of industries and labor organizations which would be affected by such standards, and shall give consideration to—

(A) the latest available scientific and medical data in the field of electronic product radiation;

(B) the standards currently recommended by (i) other Federal agencies having responsibilities relating to the

control and measurement of electronic product radiation, and (ii) public or private groups having an expertise in the field of electronic product radiation;

(C) the reasonableness and technical feasibility of such standards as applied to a particular electronic product;

(D) the adaptability of such standards to the need for uniformity and reliability of testing and measuring procedures and equipment; and

(E) in the case of a component, or accessory described in paragraph (2)(B) of section 360hh of this title, the performance of such article in the manufactured or assembled product for which it is designed.

(2) The Secretary may prescribe different and individual performance standards, to the extent appropriate and feasible, for different electronic products so as to recognize their different operating characteristics and uses.

(3) The performance standards prescribed under this section shall not apply to any electronic product which is intended solely for export if (A) such product and the outside of any shipping container used in the export of such product are labeled or tagged to show that such product is intended for export, and (B) such product meets all the applicable requirements of the country to which such product is intended for export.

(4) The Secretary may by regulation amend or revoke any performance standard prescribed under this section.

(5) The Secretary may exempt from the provisions of this section any electronic product intended for use by departments or agencies of the United States provided such department or agency has prescribed procurement specifications governing emissions of electronic product radiation and provided further that such product is of a type used solely or

predominantly by departments or agencies of the United States.

(b) Administrative procedure

The provisions of subchapter II of chapter 5 of title 5 (relating to the administrative procedure for rulemaking), and of chapter 7 of title 5 (relating to judicial review), shall apply with respect to any regulation prescribing, amending, or revoking any standard prescribed under this section.

[...]

Sec. 360ss. State standards

Whenever any standard prescribed pursuant to section 360kk of this title with respect to an aspect of performance of an electronic product is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the Federal standard. Nothing in this part shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a requirement with respect to emission of radiation from electronic products procured for its own use if such requirement imposes a more restrictive standard than that required to comply with the otherwise applicable Federal standard.

[...]

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 55—NATIONAL ENVIRONMENTAL POLICY

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential

considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and

(2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

> (D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
>
> > (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
> >
> > (ii) the responsible Federal official furnishes guidance and participates in such preparation,
> >
> > (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
> >
> > (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other

responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

[...]

CODE OF FEDERAL REGULATIONS (2000)

TITLE 47—TELECOMMUNICATION

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

PART 1—PRACTICE AND PROCEDURE

Subpart I. Procedures Implementing the National Environmental Policy Act of 1969

[...]

Sec. 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

[...]

(e) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the regulations contained in this chapter concerning the environmental effects of such emissions. For purposes of this paragraph:

(1) The term personal wireless service means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(2) The term personal wireless service facilities means facilities for the provision of personal wireless services;

(3) The term unlicensed wireless services means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services; and

(4) The term direct-to-home satellite services means the distribution or broadcasting of programming or

services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite

[...]

LOUISIANA CIVIL CODE (West, 2003)

Book III—Modes of Acquiring Ownership of Things

Title VII—Sale

Chapter 9. Redhibition

Art. 2520. Warranty against redhibitory defects

The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.

A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives the buyer the right to obtain rescission of the sale.

A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

[...]

Art. 2522. Notice of existence of defect

The buyer must give the seller notice of the existence of a redhibitory defect in the thing sold. That notice must be sufficiently timely as to allow the seller the opportunity to make the required repairs. A buyer who fails to give that notice suffers diminution of the warranty to the extent the seller can show that the defect could have been repaired or that such repairs would have been less burdensome, had he received timely notice.

Such notice is not required when the seller has actual knowledge of the existence of a redhibitory defect in the thing sold.

[...]

Art. 2531. Liability of seller who knew not of the defect

A seller who did not know that the thing he sold had a defect is only bound to repair, remedy, or correct the defect. If he is unable or fails so to do, he is bound to return the price to buyer with interest from the time is was paid, and to reimburse him for the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, less the credit to which the seller is entitled if the use made of the thing, or the fruits it has yielded, were of some value to the buyer.

A seller who is held liable for a redhibitory defect has an action against the manufacturer of the defective thing, if the defect existed at the time the thing was delivered by the manufacturer to the seller, for any loss the seller sustained because of the redhibition. Any contractual provision that attempts to limit, diminish or prevent such recovery by a seller against the manufacturer shall have no effect.

[...]

Supreme Court, U.S.
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No. 05-198

In the Supreme Court of the United States

NOKIA INC., ET AL.,

Petitioners,

v.

GARRETT NAQUIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 129 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a wide array of products and services. A list of PLAC's current corporate membership is included in an appendix to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, and has participated in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000). Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

STATEMENT

1. Since the advent of commercial radio communications in the United States (used first in wireless telegraphy and then in radio audio transmissions), the federal government has exercised regulatory authority over the new medium. See *NBC* v.

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[1] Letters of consent by the parties to the submission of this brief have been filed with the Clerk's office. Pursuant to Rule 37.6 of the Rules of this Court, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

United States, 319 U.S. 190, 210-12 (1943). As petitioners show (Pet. 5-8), federal regulation of all forms of interstate communication by radio has been – and remains today – plenary and comprehensive.

To preserve the national government's exclusive authority in this field, Congress has enacted a number of provisions expressly preempting state and local authority. One such provision instructs that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3). Congress has also conferred sweeping regulatory powers upon the FCC to regulate radio communications. See, *e.g.*, *id.* §§ 301, 303. Pursuant to that authority, the FCC has issued detailed regulations governing radio frequency ("RF") emissions from cell phones. See, *e.g.*, 47 C.F.R. §§ 1.1307(b), 2.1093(d), 2.803(a). Among other things, the FCC has concluded that there are no known risks from exposure to RF emissions from wireless phones that comply with FCC standards and, accordingly, public safety would not be promoted by requiring headsets to be used or provided with such phones. See Pet. 24. It is "imperative," the FCC has stated, that the States not be allowed to impose "additional requirements" that "could conflict with [federal] standards and frustrate" the uniform "federal scheme for the provision of nationwide cellular service." *Use of the Bands 825-845 MHZ and 870-890 MHZ*, 89 FCC 2d 58, 95 ¶ 81 (1982).

2. This case arises out of five class actions brought by past and future purchasers of cell phones against virtually the entire wireless industry. In the one implicated by the petition for certiorari (see Pet. 1 n.1, 12-13, 15 n.3), a class of Louisiana residents who were not provided headsets with their cell phones and who have not been diagnosed with certain diseases brought suit against multiple cell phone manufacturers and service providers. See Pet. App. 53a-56a & n.4.

In essence, plaintiffs (respondents here) contended that the cell phones provided to them without a headset are unreasonably dangerous because they emit unsafe levels of RF radiation. Respondents advanced a wide array of state-law claims, includ-

ing strict products liability, negligent misrepresentation, breach of implied warranty, and other tort claims. In addition to seeking a determination that their FCC-compliant cell phones were unreasonably dangerous when used without headsets, respondents requested various forms of relief, including compensatory damages for the cost of purchasing the missing headsets, punitive damages, attorneys' fees, an injunction requiring the defendants (petitioners here) to provide cell phones that are compatible with headsets, and an injunction requiring petitioners to provide instructions on the use of headsets as well as warnings about using cell phones without headsets.

3. The district court granted petitioners' motion to dismiss on grounds of federal preemption. Pet. App. 51a-76a. It ruled that respondents' claims were impliedly preempted because they conflict with the judgment reached by the FCC concerning safe levels of RF emissions and frustrate "Congress's objective[] of achieving national uniformity in wireless telecommunications services." *Id.* at 65a. In analyzing the issue of implied preemption, the district court declined to apply a "presumption against preemption." *Id.* at 62a-63a. "That presumption is not triggered," the court explained, "when the state claim falls in an area 'where there has been a history of significant federal presence.'" *Id.* at 63a (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)). "Congressional concern for national uniformity of regulation in the field of wireless telecommunications," the court reasoned, "has been clear since the inception of commercial wireless telephone service." *Ibid.* Beyond that, the court explained, "these lawsuits do not involve a traditional claim of compensation for personal injury" where such a presumption might be appropriate (since the plaintiff class "excludes those who have developed" illness and makes "no request for personal injury compensation"). *Ibid.*

4. A divided panel of the Fourth Circuit reversed. Pet. App. 1a-50a. The majority first disagreed with the district court's conclusion "that the presumption against preemption does not apply here." *Id.* at 34 n.4. The lower court's reliance on *Locke*, which involved preemption of the State of Washington's oil

tanker regulations, was "misplaced," the court of appeals said, "because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce." Pet. App. 35 n.4. Moreover, the majority reasoned, "[t]he presumption against preemption is even stronger" when "state remedies, like tort remedies," are implicated and "no federal remedy exists." *Ibid.* (internal quotations omitted). Applying this "strong" presumption against preemption (*id.* at 41a), the panel rejected petitioners' arguments for both express and implied preemption. *Id.* at 35a-45a.

INTRODUCTION AND SUMMARY OF ARGUMENT

As petitioners demonstrate, this case satisfies all of the traditional criteria of certworthiness. The Fourth Circuit's decision conflicts with the decisions of other circuits and this Court; it is seriously mistaken; and, if permitted to stand, it will subvert the uniform national regulatory scheme governing wireless communications by allowing judges and lay juries applying state law to second-guess the FCC's judgment about the appropriate level of RF emissions in cellular telephones.

Although those are reasons enough to grant the petition, there is an additional reason why further review is warranted. This case offers an ideal vehicle for clarifying – and reexamining – an important and recurring issue in every preemption case as to which the lower courts are divided: the so-called "presumption" against preemption. See Pet. 26 n.6. This Court should grant review not only to address the confusion in the lower courts over the presumption, but also to reexamine a doctrine whose legitimacy has been the subject, in recent years, of persuasive criticism by judges and legal scholars.

I. The panel majority in the Fourth Circuit disagreed with the district court over whether the presumption against preemption is applicable to this case. In the district court's view, this case falls within a recognized exception to the presumption because there has been a "'history of significant federal presence'" in regulating "commercial wireless telephone service."

Pet. App. 63a (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)). Applying a different conception of how to measure a "significant federal presence," the Fourth Circuit reached the opposite conclusion, applied the presumption, rejected petitioners' preemption defense, and reversed.

The Fourth Circuit's interpretation of the *Locke* exception is symptomatic of – and compounds – the conflicts and confusion in the lower courts concerning what the presumption against preemption means and when it applies. The circuits have taken different approaches, for example, to determining when a history of federal regulation qualifies as "significant" and how to define the relevant regulatory "field" in the first place. Applying those divergent approaches, the courts of appeals have also reached conflicting conclusions about whether particular "fields" are covered by the presumption. Beyond that, the Fourth Circuit's suggestion that the presumption comes in an "extra-strength" form is wrong and would "further complicat[e]" principles of preemption law that are "already * * * difficult to apply." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000). Equally mistaken – and inconsistent with this Court's teaching in *Aetna Health Inc.* v. *Davila*, 124 S. Ct. 2488 (2004), and *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) – is the Fourth Circuit's suggestion that the presumption applies merely because some "state remedies" would be unavailable if the preemption defense were accepted.

II. Review is also warranted to reexamine the presumption against preemption in light of persuasive criticisms leveled in recent years by judges, legal scholars, and prominent practitioners. In addition to the confusion over the presumption's application in the lower courts, recent scholarship and commentary has challenged the assumption – reflected but not explained in some of this Court's opinions – that the presumption finds support in the Constitution's text or structure and in traditional principles of federalism. Scholars have demonstrated that, far from having deep roots in our legal traditions, the presumption was not mentioned in this Court's earliest preemption decisions; it was recognized for the first time in the 1920s and 1930s; and,